

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

11,058
No. ~~51151~~

FILED AUG 10 1951

DORIS B. WESLEY, *Appellant*

v.

B. FRANKLYN BROWN and
WESLEY S. WILLIAMS, COMMITTEE
of FRANCES L. JENKINS, *Appellees*

MARJORIE A. MCKENZIE
AUBREY E. ROBINSON, JR.
BELFORD V. LAWSON, JR.
Attorneys for Appellant
2001 11th Street, N. W.
Washington, D. C.

No. 11,058

STATEMENT OF QUESTIONS PRESENTED

Whether

- (1) A tenancy by the entirety is converted into a tenancy in common upon the entry of a final decree of divorce where one of the parties to the divorce action dies before the expiration of the six months period required for the termination of the marriage.
- (2) the heirs at law of a successful plaintiff in a divorce action, who dies five months and four days after the entry of a decree of final divorce (no appeal having been taken), inherit a share in real property which their intestate held as a tenant by the entirety prior to the entry of the divorce decree.

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IN THE
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No. ~~51~~ 11058

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v.

B. FRANKLYN BROWN and
WESLEY S. WILLIAMS, COMMITTEE
of FRANCES L. JENKINS, *Appellees*

APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

This cause comes to this Court on appeal from an order of the United States District Court for the District of Columbia, dated May 21, 1951, granting appellee's motion for summary judgment and denying appellant's oral motion for summary judgment. Appellant's suit below set forth her right to partition, under para. 1301 of Title 16, D. C. Code (1940), as a tenant in common with appellee of certain real property (App. p. 1). Appellant's sister, having a like interest with appellant in the property, was made a party defendant and answered through her Committee (App. p. 2). Appellee's answer (App. p. 3) was followed by a motion for summary judgment, which motion included orders of the United States District Court for the District of Columbia, dated March 8, 1950, and December 28, 1950, in Civil Action No. 27173. (App. p. 4). Appellee opposed

appellant's right to partition on the basis of the status of divorce litigation between him and his wife at the time of her death, as represented by the said orders. At the hearing on appellee's motion, appellant made a counter-motion for summary judgment, orally, by leave of the Court. Notice of appeal was filed below on May 24, 1951 and an amendment thereto made on June 1, 1951 (App. p. 17). The record on appeal was lodged in this Court in season.

Jurisdiction for this appeal is to be found in the provisions of Title XXVIII, Sections 1291, et seq., of the United States Code, as revised.

STATEMENT OF THE CASE

After years of marital discord, during which appellee was cruel and abusive to her, the late Frances Y. Brown filed Civil Action No. 27173, a suit for limited divorce, on December 28, 1944. The parties, who were both teachers in the District of Columbia schools, were the parents of two daughters, one of whom at the time of filing of the divorce action was a seventeen year old minor. That daughter, Frances L. Jenkins, has since become a patient at St. Elizabeth's Hospital (Mental Health No. 365-49). She is represented here by her Committee. The other daughter is the appellant.

Judgment for a limited divorce was granted to Frances Y. Brown by Judge O'Donoghue on November 20, 1945, the Court having found that appellee had caused his wife serious bodily harm on October 8, 1944, as well as on numerous other occasions.

Despite the pendency of Civil Action No. 27173, appellee filed Equity No. A 2688, a suit for absolute divorce, on the ground of three years' voluntary separation, in the Circuit Court of Prince Georges County, Maryland, on October 31, 1949. Service on Frances Y. Brown was by publication, but on December 5, 1949, she appeared voluntarily in the Maryland proceedings, answered appellee's complaint

therein and later filed a motion to dismiss on the ground of *forum non conveniens*.

On February 8, 1950, Frances Y. Brown filed a motion to enlarge the limited decree of November 20, 1945, into a judgment for absolute divorce and also prayed the Court to award to her real property known as 532 Oklahoma Ave., N. E., Washington, D. C., which the parties had owned as tenants by the entirety prior to any of the above-mentioned litigation. Appellee filed objections to both the enlargement of the decree and to the disposition of the property.

Thereafter, on March 8, 1950, Judge Burnita Shelton Matthews enlarged the judgment for limited divorce into a final decree of divorce. This decree did not award, apportion or refer to premises 532 Oklahoma Ave., N. E. (App. p. 9). For, in reliance upon the efficacy of para. 409 of Title 16, D. C. Code (1940), as well as in a spirit of a compromise and in an effort to put an end to the litigation between the parties, Frances Y. Brown did not press her claim to the entire premises.

Frances Y. Brown died, intestate, in an automobile accident on August 12, 1950, leaving the appellant and Frances L. Jenkins as her heirs at law. During the five months and four days that had elapsed, appellee had not appealed the decree of March 8, 1950.

Appellee immediately went about the business of disinheriting the daughters whom he had not supported during their mother's lifetime. On October 6, 1950, he filed a motion in Civil Action No. 27173 to vacate and set aside the decree of March 8, 1950. Judge Matthews abated the action by reason of Frances Y. Brown's death, but refused to vacate the decree (App. p. 10), thus leaving the record unchanged and as it stood on the date of Frances Y. Brown's death. Appellee then sought to intervene in the administration of Frances Y. Brown's estate and inappropriately asserted his claim to premises 532 Oklahoma Ave., N. E. in those proceedings.

Appellant, who is the administratrix of the Estate of Frances Y. Brown, Adm. No. 76,608, filed this suit for partition as a tenant in common with appellee of the property in question and claims by descent on the ground that her intestate, Frances Y. Brown, was a tenant in common of said property on the date of her death. Appellant submits that the lower Court's granting of appellee's motion for summary judgment constitutes reversible error.

SUMMARY OF ARGUMENT

1.

Where a wife obtains a divorce from her husband and the real property which they formerly held as tenants by the entirety is not awarded to either party, nor apportioned, nor referred to in the decree, such tenancy stands dissolved upon the entry of the decree of divorce and the parties are thereafter tenants in common. The wife's death, intestate, five months and four days after the entry of the decree, results in the passing of her interest in the property in question to her heirs at law.

2.

The recognition of this statutory right does not conflict with the legislative policy of this jurisdiction against easy divorce and hasty remarriage. We are concerned here only with a property right in which the state has no interest over and above that of the parties.

3.

Under the facts of this case, all the pertinent law can be strictly applied without incongruous results. In this case, the equity of the statutory provision can be realized only under a "plain meaning" interpretation of its terms.

ARGUMENT

I.

The tenancy by the entirety was dissolved upon the entry of the final decree of divorce.

The language of para. 409 of Title 16, D. C. Code (1940),¹ is clear and unmistakable on this point. The legislative history of para. 409 shows it to have been added in 1935, when the divorce laws of the District of Columbia were amended, and to have been a new section.² Prior to its promulgation, when property rights had to be adjudicated as a result of a divorce decree, a separate action in equity was necessary.³

This Court has construed para. 409 as being of sufficient force to change the nature of the ownership of property in the District of Columbia, even where the parties were divorced by a foreign decree. *Scholl v. Scholl* (80 U. S. App. D.C. 292, 152 F. 2d 672, 1945.) The Court said, speaking of para. 409, (80 U.S. App. D.C. at 295):

“The section of the Code upon which appellant relies contains two provisions. The first, and basic, provision is that upon entry of a final decree of divorce, all property rights of the parties in joint tenancy or tenancy by the entirety shall stand dissolved. That is substantive law respecting property.”

¹ 16 D. C. Code (1940), para. 409:

“Upon the entry of a final decree of annulment or divorce a vinculo, in the absence of a valid antenuptial or postnuptial agreement in relation thereto, all property rights of the parties in joint tenancy or tenancy by the entirety shall stand dissolved and the court, in the same proceeding in which such decree is entered, shall have power and jurisdiction to award such property to the one lawfully entitled thereto or to apportion the same in such manner as shall seem equitable, just and reasonable. (Mar. 3, 1901, ch. 854, para. 974a, as added Aug. 7, 1935, 49 Stat. 540, ch. 453, para. 3.)”

² H. Rep. No. 1532, 74th Cong., 1st Sess., p. 4; S. Rep. No. 720, 74th Cong., 1st Sess., p. 2.

³ *Ibid.*

And, in a subsequent suit for partition between these same parties, *Scholl v. Scholl*, C.A. No. 29532, 72 F. Supp. 823, (1947), the U. S. District Court for the District of Columbia said, at 824:

“It follows, therefore, that when the marriage relationship was dissolved at the suit of the wife, by the Florida Court, full faith and credit being given that judgment by this Court, the estate of which the individuals were seized, *on the date of that decree*⁴—the unity which gave it its essential character being thus abrogated by operation of law—it became a tenancy in common, and, therefore, the complaint is and must be treated as one between such tenants, and this by the great weight of authority.”

The precedents of this jurisdiction provide an unbroken line of support in favor of a literal construction of the operation of para. 409 and of the principle that once the equity power of the court have been invoked, all necessary relief will be granted. *Bowles v. Wray et al.*, C.A. No. 12121, 72 F. Supp. 823 (1942); *Moran v. Moran*, 82 U.S. App. D.C. 107, 160 F. 2d 925 (1947); *Scholl v. Scholl*, *supra*. Cf. *Myers v. East End Loan and Savings Ass'n*, 139 Md. 607, 612, 116 A. 453 (1922).

The Court below has held that para. 409 of Title 16 is not controlling of the rights of the parties because of the force of para. 421 of Title 16, D.C. Code (1940).⁵ It considered itself bound by the decision of this Honorable Court in *Oliver v. Oliver*, U.S. App. D.C., No. 10, 405, which was decided on October 23, 1950, and which held that para. 421

⁴ Emphasis supplied.

⁵ 16 D. C. Code (1940), para. 421:

“No final decree annulling or dissolving a marriage shall be effective to annul or dissolve the marriage until the expiration of the time allowed for taking an appeal, nor until the final disposition of any appeal taken, and every final decree shall expressly so recite. Every decree for absolute divorce shall contain the date thereof and no such final decree shall be absolute and take effect until the expiration of six months after its date. (Apr. 19, 1920, 41 Stat. 567, ch. 153, para. 983a; Aug. 7, 1935, 49 Stat. 540, ch. 453, para. 4.)”

contemplates a provisional decree of divorce that is not effective until the lapse of the six months period. But since the legislative purpose in providing for a waiting period is so clearly stated in terms of hasty divorce and remarriage, the application of para. 421 to a situation involving property rights that are governed by another, related statute is a strained and unnecessary construction leading to the mischief found in this case.

Although the legislative purpose in establishing the waiting period is indisputable, the legislative history of para. 421 indicates that Congress did not intend to provide for interlocutory decrees of divorce. H. Rep. No. 1532, 74th Congress, 1st Session, which accompanied the 1935 amendment to the divorce laws of the District of Columbia, states the following concerning para. 421 at page 4.

“Section 983a relates to the effective date of annulling or dissolving a marriage. (Under the present law an interlocutory decree is given; and after the expiration of 90 days—and no appeal has been taken—another decree must be issued within a 30 day period, or the previous decree is vacated.) *This bill makes no provision for an interlocutory decree*, but provides that no final decree annulling or dissolving a marriage will be effective until the expiration of the time allowed for taking an appeal, or until the final disposition of an appeal taken.”⁶

The consistent use of the word “final” in describing decrees of divorce in both para. 409 and para. 421 reflects a clear legislative intent to dispense with interlocutory judgments in divorce cases. These two sections were part of a comprehensive revision of the divorce laws of the District of Columbia and it must be presumed that Congress considered their joint and several effect, did not regard them as incongruous, and might easily have worded para. 409 so that the dissolution of tenancies by the entirety would take

⁶ Emphasis supplied.

effect at the expiration of the time allowed for taking an appeal. Surely there would be no question about the clarity and efficacy of the statutory guide provided by para. 409 if our concern here were to establish the proper date for stating an account between tenants in common who had held as tenants by the entirety prior to their divorce.

It is important that we read para. 409 and para. 421 together, since, by so doing, we can see that even if ours are interlocutory or provisional decrees, they are so for a limited purpose. The incorporation of a property provision in the divorce laws of the District of Columbia removes this area of controversy from the general ambit of other special provisions and results in a legislative scheme not to be confused with those of other jurisdictions. Accordingly, the citation by appellee of cases in other jurisdictions, which do have statutes providing beyond any doubt for interlocutory decrees, does not supply an authoritative guide in this case.

There is a growing body of authority which holds that even in such jurisdictions, i.e., those having interlocutory decrees, where property rights have been settled upon the granting of the interlocutory decree, the subsequent death of one of the parties before, by lapse of time, it had become final, does not result in the setting aside of the decree nor in a reconsideration of the appropriate channels of devolution of such property. *Morris v. Propst*, 98 Colo. 213, 55 P. 2d 944; Annotation: 104 ALR 650. In *Durland v. Durland*, 67 Kan. 734, 74 P. 274, a husband and wife were divorced under a decree which contained a provision that it should "not become absolute and take effect until the expiration of six months" from the date of its rendition. The parties had reached a property settlement which the court adopted as part of its judgment. The wife died before the six months had expired and the husband claimed the residue of the sum paid her, which had been left in the hands of her administrator, on the theory that the title had not passed, that the

marriage was not dissolved and that in any event he was entitled to one-half of the money as the surviving husband. The court held that the provisions of the divorce statute under which the decree was granted were intended to prevent a marriage by either party within six months after the decree and that as to that matter only the decree was not final, every other result of a complete dissolution of the marriage following at once. Hence, it was held that title to the money had passed to the wife and that the husband was not her heir. 17 Am. Jur. para 437.

It should be emphasized here that appellee sought to have the decree of March 8, 1950 vacated and set aside for the purpose of establishing a claim to the sole ownership of the property in question. In her memorandum opinion of December 28, 1950, denying appellee's motion, Judge Burnita Shelton Matthews said the following:

“ * * * attorneys for the plaintiff (appellant herein) contend that under the quoted Code provision upon the entry of the decree plaintiff and defendant became owners of the property as tenants in common, and upon plaintiff's death her interest passed to her heirs at law. This contention appears to be correct. * * * ”

II.

The recognition of this statutory property right in the wife does not conflict with the government's policy against easy divorce and hasty remarriage.

The authority of the *Oliver* case, *supra*, will not be impaired by a ruling in favor of appellant under para. 409 of Title 16. *Oliver v. Oliver* is concerned with the right of the parties to a divorce to remarry within the six months waiting period. Although, as is pointed out in the opinion of this Honorable Court in *Oliver v. Oliver*, statements made by the author of the bill for revision of the divorce laws of the District of Columbia and by other members of Congress indicate that the provision was intended as a barrier to

fraudulent divorces, the Congressional reports which accompanied the bill do not express the Congressional intent in so many words. The waiting period is consistently described as a time allowed for taking an appeal.⁷

No question concerning remarriage, bigamy, legitimacy, nor of the possible prosecution of an appeal by appellee from the decree of March 8, 1950, arises in this case. Nothing contended for here would call for the assertion of its interest in the marital status of these two residents by the District of Columbia Government. There was nothing hasty about the divorce between these parties. They had obtained a limited divorce five years earlier and had been separated prior to that time. It was in reliance upon the efficacy of para. 409 that the plaintiff in the divorce action did not specifically litigate the property issue, being mindful, as she was, of years of acrimony over the disposition of the property in question. Appellee seeks here to profit by his former wife's fortuitous death and to obtain what he could not have won legally or equitably in her lifetime. It is submitted that this is a private controversy, one for which the state has provided a rule in para. 409, in order to settle issues which the parties find difficult of adjustment. This is a controversy not within the purview of the doctrine of *Oliver v. Oliver*.

Appellee also seeks to rely on the authority of *Fleischauzer v. Hagen*, C.A. No. 8823, 69 Washington Law Reporter 221, (1941), in which Justice O'Donoghue of the U. S. District Court for the District of Columbia, ruled that a plaintiff wife, who had obtained a divorce three months prior to her husband's death, might assert rights against his police retirement fund as his surviving wife. No question concerning real property arose in this case and the construction of para. 409 of Title 16 was not involved. Moreover, there was in the *Fleischauzer* case occasion for the invocation of the policy of the District of Columbia

⁷ *Idem.*, n. 2, *supra*.

against fraudulent divorce. Two wives claimed the pension fund, but the status of one depended upon a divorce which Mr. Fleischauer had obtained in Maryland while still a resident of the District of Columbia.

A decision in favor of appellant in this case would not weaken the government's stated policy. No broad rule need be laid down here, for the facts of the case, which are unusual, would narrow the precedent and make it applicable only to like situations.

III.

Under the facts of this case, all the pertinent law can be strictly applied without incongruous results. The plain words of the statute call for a "plain meaning" interpretation of its terms.

Though an examination of the legislative history of the 1935 amendments to the divorce laws of the District of Columbia, and particularly of para. 409 and para. 421 of Title 16, contributes to an understanding of the Congressional intent in providing this legislation, these statutes are of sufficient clarity not to require extrinsic aids for their construction and application.

In *Temple v. City of Petersburg*, 182 Va. 418, 29 S. E. 2d 357, the Supreme Court of Appeals of Virginia has said, at page 419,

"If the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it. * * *"

Clearly two legislative purposes are to be found in para. 409 and para. 421 of Title 16. The latter is concerned with the protection of the marital status, the former with the disposition of property settlements simultaneously with the granting of the decree, when divorce does occur. This saves time and money, both for the Courts and the litigants. The

disposition, whether by an automatic splitting of a joint interest or in consonance with an exercise of its equity powers by the court, is to be made at the time of the entry of the final decree. The word "entry" scarcely requires definition, but Webster's New International Dictionary defines it thus: "Act of making or entering a record; a setting down in writing the particulars, as of a transaction. * * * " The New Century Dictionary defines it thus: " * * * the act of entering or recording something in a book, register, list, etc. * * * "

No entries are made in respect of divorce decrees in the District of Columbia after the date of the judgment, in the absence of an appeal. Our decrees are final when entered and in this differ from interlocutory decrees which require the filing of other papers and action by one of the litigants or by the court on its own motion before they can be regarded as final.

Where, as with para. 409, "the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it."⁸ To read para. 409 literally does not defeat the purposes of para. 421. Only a "plain meaning"⁹ interpretation will also serve the equity of the statute, a coincidence that is not invariably within the judicial experience.¹⁰

⁸ *Hamilton v. Rathbone*, 175 U. S. 414, 419, 20 S. Ct. 155, 44 L. Ed. 219 (1899).

⁹ Jones, "The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes," 25 Wash. U.L.Q. 2 (1939).

¹⁰ Landis, "Statutes and the Sources of Law," Harvard Legal Essays, 1934.

CONCLUSION

For the reasons stated herein, we submit that the orders granting appellee's motion for summary judgment and denying appellant's counter motion should be reversed.

Respectfully submitted:

MARJORIE A. MCKENZIE
AUBREY E. ROBINSON, JR.
BELFORD V. LAWSON, JR.
Attorneys for Appellant
2001 11th Street, N. W.
Washington, D. C.

STATUTES

1.

16 D. C. Code (1940), para. 409:

Upon the entry of a final decree of annulment or divorce a vinculo, in the absence of a valid antenuptial or postnuptial agreement in relation thereto, all property rights of the parties in joint tenancy or tenancy by the entirety shall stand dissolved and the court, in the same proceeding in which such decree is entered, shall have power and jurisdiction to award such property to the one lawfully entitled thereto or to apportion the same in such manner as shall seem equitable, just and reasonable. (Mar. 3, 1901, ch. 854, para. 974a, as added Aug. 7, 1935, 49 Stat. 540, ch. 453, para. 3).

2.

16 D. C. Code (1940), para. 421:

No final decree annulling or dissolving a marriage shall be effective to annul or dissolve the marriage until the ex-

piration of the time allowed for taking an appeal, nor until the final disposition of any appeal taken, and every final decree shall expressly so recite. Every decree for absolute divorce shall contain the date thereof and no such final decree shall be absolute and take effect until the expiration of six months after its date. (Apr. 19, 1920, 41 Stat. 567, ch. 153, para. 983a; Aug. 7, 1935, 49 Stat. 540, ch. 453, para. 4.)

3.

16 D. C. Code (1940), para. 1301:

The equity court may decree a partition of any lands, tenements, or hereditaments on the bill or petition of any tenant in common, claiming by descent or purchase, or of any joint or coparcener; or if it appear that said lands, tenements, or hereditaments can not be divided without loss or injury to the parties interested, the court may decree a sale thereof and a division of the money arising from such sale among the parties, according to their respective rights; and this section shall apply to cases where all the parties are of full age, to cases where all the parties are infants, to cases where some of the parties are of full age and some infants, to cases where some or all of the parties are non compos mentis, and to cases where all or any of the parties are non-residents; and any party, whether of full age, infant, or non compos mentis, may file a bill under this section, an infant by his guardian or prochein ami and a person non compos mentis by his committee: Provided, That in every case of partition any tenant in common who may have received the rents and profits of the property to his own use may be required to account to his cotenants for their respective shares of said rents and profits, and any amounts found to be due on said accounting may be charged against the share of the party owning the same in the property, or its proceeds in case of sale. (Mar. 3, 1901, 31 Stat. 1203, ch. 854, Sec. 93; June 30, 1902, 32 Stat. 523, ch. 1329.)

APPENDIX

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,058

DORIS B. WESLEY,
Appellant,

v.

B. FRANKLIN BROWN,
Appellee.

JOINT APPENDIX

1 Filed Feb. 5, 1951. Harry M. Hull, Clerk

• • • • •
COMPLAINT FOR PARTITION OF REAL PROPERTY

The plaintiff respectfully represents to this Honorable Court as follows:

1. That jurisdiction is found in Title 16-1301 of the District of Columbia Code (1940).

2. That the plaintiff, Doris B. Wesley, and Frances L. Jenkins who was adjudicated of unsound mind by this Court on March 25, 1949 in Mental Health No. 365-49, are daughters of the defendant, B. Franklyn Brown, and Frances Y. Brown, former resident of the District of Columbia, who died intestate on August 12, 1950; that on March 8, 1950 this Court, in Civil Action No. 27173 entered a final decree of absolute divorce in favor of said Frances Y. Brown against

the defendant, B. Franklyn Brown, in which no disposition was made of certain real property, to wit, 532 Oklahoma Ave., N.E., located in the District of Columbia, which was owned by Frances Y. Brown and B. Franklyn Brown as tenants by the entirety, and which after the decree of March 8, 1950 they owned as tenants in common by operation of law; that as a result of their mother's death intestate, plaintiff and her sister, Frances L. Jenkins, became joint tenants of an undivided one-half interest in the aforementioned premises as tenants in common with their father.

3. That there are no other persons than the plaintiff and the defendants interested in said property; that the said Frances Y. Brown left surviving her no parent and no children other than the two aforementioned daughters.

4. That a partition of the aforesaid property cannot be made without injury to the parties in interest by reason of the fact that if it were divided, it would be of no value, whereas a sale of said property would be more advantageous to all parties interested.

2 Wherefore, the plaintiff prays:

1. That a trustee be appointed to sell the aforesaid property and make full and proper report to this Court.

2. That the proceeds of said sale be divided between the parties as their interests may appear.

3. For such other and further relief as to the Court may seem just and proper.

(s) Doris B. Wesley.

• • • • •

3 Filed Feb. 26, 1951. Harry M. Hull, Clerk

ANSWER TO COMPLAINT FOR PARTITION OF REAL PROPERTY

Comes now the defendant, Wesley S. Williams, Committee of Frances L. Jenkins, and for answer to the complaint filed herein, states as follows:

Defendant admits all of the allegations contained in the plaintiff's complaint and joins with the plaintiff in plaintiff's prayers.

(s) Wesley S. Williams, Committee of Frances L. Jenkins.

• • • • •

4 Filed Mar. 5, 1951. Harry M. Hull, Clerk.

**ANSWER OF DEFENDANT, B. FRANKLIN BROWN,
TO COMPLAINT FOR PARTITION OF
REAL PROPERTY**

Now comes the defendant, B. Franklyn Brown, by his attorneys, Robert W. McCullough and William T. Pace, and answering the Complaint for Partition of Real Property shows to the Court as follows:

First Defense

The Complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

1. The defendant admits the Court has jurisdiction pursuant to Title 16-1301 in the event the property is held as joint tenants, but said Statute does not apply in the event the property was held as tenants by the entirety.

2. The defendant admits all orders in the Mental Health case No. 365-49; admits Frances Y. Brown died intestate, as alleged; admits all Court orders in Civil Action No. 27173, which was a divorce proceeding between Frances Y. Brown, plaintiff and B. Franklyn Brown, defendant; admits that there was no disposition made of real estate at 532 Oklahoma Ave., N.E., Washington, D. C. The defendant is unable to admit or deny other allegations of paragraph 2 because they are conclusions of law and should be stricken.

3. The defendant admits the allegation of paragraph 3 in that there were only two daughters surviving Frances Y. Brown.

5 4. The defendant admits that the real property can not be divided in part.

Wherefore, the defendant prays as follows:

1. That plaintiff's prayer to appoint a trustee to sell said property be denied.

2. That plaintiff's prayer to sell the property and divide the proceeds be denied.

3. That plaintiff's Complaint be dismissed with prejudice and costs.

4. For such other and further equitable relief as to the Court may seem just and proper.

(s) B. Franklin Brown.

* * * * *

6 Filed Apr. 3, 1951. Harry M. Hull, Clerk

**MOTION FOR SUMMARY JUDGMENT BY
DEFENDANT, B. FRANKLIN BROWN**

Now comes the defendant, B. Franklyn Brown, by his attorneys, Robert W. McCullough and William T. Pace, and moves the Court as follows:

That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in favor of the defendant, B. Franklyn Brown, dismissing the action on the ground that there is no genuine issue as to any material fact, and that the defendant, B. Franklyn Brown, is entitled to judgment as a matter of law.

This Motion is based upon:

1. That the real estate at 532 Oklahoma Ave., N.E., Washington, D. C., prior to and on March 8, 1950, was held as

tenants by the entirety by B. Franklyn Brown and Frances Y. Brown.

2. Court Order of this Court of March 8, 1950 in Civil Action No. 27-173, which was a decree nisi or interlocutory, providing that the divorce would not be final for six months.

3. The death of Frances Y. Brown on August 12, 1950.

4. Order of this Court dated December 28, 1950 in Civil Action No. 27-173 stating, in substance, that the divorce proceeding abated August 12, 1950 before the decree could become effective to dissolve the marriage of Frances Y. Brown and B. Franklyn Brown.

5. The above orders are to be made a part of this Motion.

Wherefore, the defendant, B. Franklyn Brown, prays as follows:

1. That the Motion for Summary Judgment be granted.

2. That the Complaint be dismissed.

7 3. That this Court pass a decree finding that B. Franklyn Brown is the fee simple owner of said property and that the heirs at law and next of kin of Frances Y. Brown have no interest in said real estate.

(s) Robert W. McCullough, (s) Wm. T. Pace (Attorneys for Defendant, B. Franklyn Brown).

Points and Authorities

1. Oliver vs. Oliver, U. S. Court of Appeals of the District of Columbia, No. 10,405, decided October 23, 1950, which said:

"Under the local statute the waiting period is made a preliminary and inseparable part of a proceeding for absolute divorce. Until that period has expired there is no complete and final termination of the marriage state.

That such a waiting period was purposely designed seems perfectly clear from the language of the statute, and is borne out by the legislative record."

"The divorce had not become absolute and effective. The marriage had not been terminated. It remained undissolved and an attempted second marriage in violation of the District's law was void."

2. Justice O'Donoghue, in 1941, in Civil Action No. 8823, *Fleischauer vs. Hagen*, 69 Washington Law Reporter 221, ruled that the surviving wife was entitled to property rights of the deceased husband who died in the six month waiting time.

Surviving wife asked for an injunction and money judgment against the defendant, Metropolitan Police Retirement and Relief Fund. The defendant was represented by the Corporation Counsel's office. The facts in this case were:

- (a) In 1935 the plaintiff wife was granted a limited divorce.
- (b) March 8, 1940 the limited divorce was enlarged to an absolute divorce and contained the statutory provision to take effect in six months, etc. (date being September 8, 1940).
- (c) The defendant husband died July 15, 1940.

Justice O'Donoghue of this Court granted judgment for the surviving wife allowing her to obtain the property rights of her deceased husband as a surviving wife.

8 3. *Re: Waller's Estate*, 1928, 217 N.W. 588, 116 Neb. 352. Nebraska's divorce statute is similar to the District of Columbia, to wit: "A decree of divorce shall not become final or operative until six months after trial and decision."

Mr. Waller died two months later. The Appeal Court held Mrs. Waller "became restored to all her matrimonial and property rights in the Waller estate, and from the fact that the decree of divorce never became final she is the surviving widow of the decedent."

4. *Chase vs. Webster*, Mass., 46 N.E. Reporter 705. A

decree of divorce nisi does *not* dissolve the marriage, and hence the death of either party thereafter, and before the decree is made absolute, puts an end to the suit, leaving the survivor with all legal rights growing out of the marriage.

5. *Spencer vs. Clark*, 179 P. 741; 54 Utah 83 — By the Decree it is:

“ordered, adjudged and decreed that the plaintiff, Ethel Atkinson Johnson, be and hereby is granted an interlocutory divorce from the defendant, Harry T. Johnson, dissolving and cancelling the marriage contract heretofore existing between them, and that said divorce shall become absolute and final after the expiration of six months from the date of this decree is signed, unless the same be set aside, modified or appealed from.”

One month 15 days after entry Mr. Johnson died. App. Court said:

“Since the plaintiff was the wife of Harry T. Johnson at the time of his death, it would naturally follow that *she became vested with every right which the law grants to the surviving spouse.*”

6. Title 16-409 is inapplicable because *final* decree never came into being because the divorce proceeding abated, as was determined by Judge Matthews' order of December 28, 1950; also because the Court did not adjudicate property rights, and it has been held that where money and property rights are involved in a divorce proceeding they are merely incidental to the divorce and in the event that the parties are not divorced or the proceedings are abandoned or abated, those incidental rights do not take effect.

9 7. Legislative history of Title 16-409 was reported in Senate Report No. 720 on May 13, 1935, 74th Congress, first session:

“Sec. 3 of the bill adds a new section to the District Code authorizing the Court in certain instances to ap-

portion the property at the time of the entry of a final decree of annulment or divorce a vinculo in such manner as shall seem equitable, just and reasonable."

8. Additional legislative history regarding Title 16-409 is the House of Representatives Report No. 1532, July 15, 1935, 74th Congress, first session:

Chapter 22 of the above-mentioned act is further amended by the addition of a new section to be known as "Sec. 974a," which reads as follows:

"Sec. 974a. Upon the entry of a final decree of annulment or divorce a vinculo, in the absence of a valid antenuptial or postnuptial agreement in relation thereto, all property rights of the parties in joint tenancy or tenancy by the entirety shall stand dissolved and the court, in the same proceeding in which such decree is entered, shall have power and jurisdiction to award such property to the one lawfully entitled thereto or to apportion the same in such manner as shall seem equitable, just, and reasonable."

"Section 974a is a new section; and confers power and jurisdiction on the court to award property held in joint tenancy or by the entirety to the one lawfully entitled thereto, or to apportion the same in an equitable manner. (Under existing law, property rights to be adjudicated as a result of a divorce decree, must be obtained through a separation action in equity).

"The court granting a divorce decree has power and jurisdiction to award property rights—where said property is held in joint tenancy or by the entirety and in the absence of a valid antenuptial or postnuptial agreement in relation thereto, to the one lawfully entitled thereto or to apportion the same in such manner as shall seem equitable, just, and reasonable."

9. Wheeler vs. Wheeler, U. S. Court of Appeals for the District of Columbia, No. 10472, decided February 15, 1951. This case is not on the same point as this cause of action, but the Court did, at page 2, note 1, state as follows:

“Further, the above-quoted portion of section 16-409 is concerned solely with matters of procedure and not with the substantive powers of the court. *It merely authorized* the court to settle, in one proceeding, the parties’ marital status and rights as to certain types of property holdings; prior to the statute, the present Federal rules as to joinder not then being in force, separate actions were required to settle the two matters, joinder being impermissible. *Richardson v. Richardson*, 72 App. D. C. 67, 112 F. 2d 19; H. R. Rep. No. 1532, 74th Cong., 1st Sess., p. 4 (1935).”

(s) Robert W. McCullough, (s) Wm. T. Pace (Attorneys for Defendant, B. Franklyn Brown).

11 Filed Mar. 8, 1950. Harry M. Hull, Clerk

JUDGMENT FOR ABSOLUTE DIVORCE
(Enlargement of Decree for Limited Divorce)

Upon consideration of the Motion to Enlarge Judgment for Limited Divorce filed herein by the plaintiff on February 8, 1950, and served personally upon the defendant on February 14, 1950, and it having been shown that on November 15, 1945 the plaintiff was granted a Limited Divorce from the defendant for cruelty by this Court and that two years have elapsed since the granting of said judgment, during which time the plaintiff has continuously resided in the District of Columbia and has not lived or cohabited with the defendant, it is by the Court this 8th day of March, 1950,

Ordered, adjudged, and decreed that the plaintiff be and hereby is granted an absolute divorce from the defendant,

Provided that this judgment shall not become final until the expiration of the time allowed for taking an appeal, nor until the final disposition of any such appeal, not in any event until the expiration of six months from the date hereof.

(s) Burnita Shelton Matthews, Judge.

12 Filed Dec. 29, 1950. Harry M. Hull, Clerk

**ORDER DECLARING PROCEEDINGS IN THIS CAUSE
ABATED AND STRIKING MOTIONS**

It appearing to the Court that the plaintiff, Frances Y. Brown, in whose favor this Court entered a final decree of divorce on March 8th, 1950, departed this life on August 12th, 1950 before said final decree could become effective to dissolve the marriage of plaintiff and defendant, and that in consequence of plaintiff's death the proceedings herein abated, and it further appearing that subsequent to the death of plaintiff there was filed herein a motion by the defendant to vacate the said decree, and a motion by a third party for leave to intervene, it is by the Court this 28th day of December, 1950:

Ordered that the proceedings in this cause be and they are hereby declared abated by reason of the death of the plaintiff on August 12th, 1950, and that the motions filed in this action subsequent to said death be and they are hereby stricken.

(s) Burnita Shelton Matthews, Judge.

* * * * *

13 Filed Apr. 4, 1951. Harry M. Hull, Clerk

ANSWER TO MOTION FOR SUMMARY JUDGMENT

Comes now Wesley S. Williams, Committee of Frances L. Jenkins, co-defendant in the above cause and for answer to the motion for summary judgment, filed herein, requests in behalf of Frances L. Jenkins, mental health patient, that the defendant, B. Franklin Brown, be put to strict proof as to the matters and allegations set forth in his motion.

Wherefore, Defendant, Wesley S. Williams, Committee prays for relief as to the Court is fit and proper.

2. Reasonable counsel fees be allowed Wesley S. Williams to be paid by the Committee of Frances L. Jenkins.

(s) Wesley S. Williams, Committee of Frances L. Jenkins, defendant, 506 5th Street, N.W. National 4054.

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14 Filed Apr. 24, 1951. Harry M. Hull, Clerk

POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

1. Defendant is not entitled to judgment as a matter of law. He misconceives the operation of Section 409 of Title 16, D. C. Code (1940 Ed.) and seeks to use the fortuitous death of Frances Y. Brown, plaintiff's intestate herein, as a means of divesting the late Frances Y. Brown and her heirs of her interest in the real estate which is the subject matter of this action.

2. There is no dispute regarding the sequence of events which comprises the background of this case and which is reflected in other litigation between defendant and Frances Y. Brown and of which this Court may take judicial notice.

Frances Y. Brown was awarded a judgment for a limited divorce on the grounds of cruelty on November 16, 1945 in Civil Action No. 27173. Subsequently, on her motion, this was enlarged into a judgment for absolute divorce on March 8, 1950. On October 6, 1950, defendant (both herein and in the divorce action) filed a motion to vacate and set aside the decree of March 8, 1950 on the ground that plaintiff in that suit had been killed in an automobile accident on August 12, 1950. The memorandum opinion of Judge Burnita Shelton Matthews, dated December 28, 1950, which has been made a part of the record in this case, denied that motion.

3. Two sections of the D. C. Code (1940 Ed.) govern the rights of the parties as they arise from Civil Action No. 27173.

Section 409—Title 16 recites the following:

15 “Upon the *entry* of a final decree of annulment or divorce a vinculo . . . all property rights of the parties in joint tenancy or tenancy by the entirety shall stand dissolved. . . .” (Italics supplied.)

Section 421—Title 16 states the following:

“No final decree annulling or dissolving a marriage shall be effective to annul or dissolve the marriage until the expiration of the time allowed for taking an appeal, nor until the final disposition of any appeal taken . . .”

Clearly, the decree of March 8, 1950 in Civil Action No. 27173 was not an interlocutory decree, nor a decree nisi, but a final decree of divorce under the above-quoted section of the Code. The six months period which must expire before the final decree becomes effective is provided for taking of an appeal by the losing party. H. Rep. No. 1532, 74th Congress, 1st Session, which accompanied the 1935 amendment to the divorce laws of the District of Columbia, states the following concerning Section 421 of Title 16:

“Section 983a relates to the effective date of annulling or dissolving a marriage. (Under the present law an interlocutory decree is given; and after the expiration of 90 days—and no appeal has been taken—another decree must be issued within a 30 day period, or the previous decree is vacated.) *This bill makes no provisions for an interlocutory decree*, but provides that no final decree annulling or dissolving a marriage will be effective until the expiration of the time allowed for taking an appeal, or until the final disposition of an appeal taken.” (Italics supplied.)

The issue which arises in this case with regard to the property rights of the parties does not concern safeguarding the possibility that this losing defendant might have taken an appeal from the decree of March 8, 1950, nor the rights of the parties to remarry during the period when an appeal was allowable. Accordingly, decisions which are cited by the defendant as grounds for granting his motion, and which are based on statutes in other jurisdictions that do provide for interlocutory decrees and decrees nisi, are not authoritative on this question. Nor is a decision which relates to a claim concerning personality in point.

Here plaintiff invokes a statutory right under a statute whose language plainly and unmistakably defines that right. The statute establishes the rights of the parties as of the date of the *entry* of the final decree of divorce, not as of the date of the expiration of the period provided for taking an appeal. The property rights of Frances Y. Brown and B. Franklyn Brown as joint tenants or tenants by the entirety stood dissolved upon the entry of the decree of March 8, 1950. Since the real property in question was not awarded to either party, nor apportioned, nor referred to in the decree, the parties became owners of the property as tenants in common. Reference is made to the memorandum opinion of Judge Burnita Shelton Matthews in Civil Action No. 27173 on December 28, 1950, in which the Court stated the following:

“... attorneys for the plaintiff contend that under the quoted Code provision upon the *entry* of the decree plaintiff and defendant became owners of the property as tenants in common, and upon plaintiff's death her interest passed to her heirs at law. This contention appears to be correct...”

4. The rights of the parties in the instant case are further determined by Section 1301 of Title 16, D. C. Code

(1940 Ed.), pertinent clauses of which are quoted as follows:

“The equity court may decree a partition of any lands, tenements, or hereditaments on the bill or petition of any tenant in common, claiming by descent or purchase . . .”

Plaintiff, who is one of two daughters of defendant B. Franklyn Brown, and the deceased and interstate, Frances Y. Brown, seeks partition of the real property in question as a tenant in common by descent.

17

Authorities

- D. C. Code—Title 16—409 (1940 Ed.)
- Legislative History of Title 16—409, as reported in H. Rep. 1532, 74th Congress, 1st Session
- D. C. Code—Title 16—421 (1940 Ed.)
- D. C. Code—Title 16—1301 (1940 Ed.)
- Memorandum Opinion of Judge Burnita Shelton Matthews in Civil Action No. 27173 on December 28, 1950
- Steele v. Steele, D.C.D.C., 65 F. Supp. 329 (1946)
- Bowler v. Wray, D.C.D.C., 72 F. Supp. 822 (1942)
- Scholl v. Scholl, D.C.D.C., 72 F. Supp. 823 (1942)
- Meyers v. East End Loan and Savings Ass'n of Baltimore City, et al., 116 A. 455 (1922)
- Morris v. Propst, 55 F. 2d 944, 104 A.L.R. 650 (1936)

Wherefore, the premises considered, plaintiff prays that the motion of defendant, B. Franklyn Brown, be dismissed.

Lawson, McKenzie & Robinson, 2001 11th Street, N. W., Attorneys for Plaintiff, by (s) B. V. Lawson, Jr.

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18 Filed May 21, 1951. Harry M. Hull, Clerk

**ORDER FOR SUMMARY JUDGMENT FOR
DEFENDANT, B. FRANKLYN BROWN**

This cause came on to be heard on the motion of the defendant, B. Franklyn Brown, for a summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure; and the Court considered the answer to the motion filed by the plaintiff and by the defendant, Wesley S. Williams, committee for Frances L. Jenkins, patient; and considered the plaintiff's complaint for partition of real property (lot 19, square 4518, improved by premises known as 532 Oklahoma Ave., N. E., Washington, D. C.); and considered the other pleadings and the two orders in Civil Action 27173 dated March 8, 1950 and December 28, 1950; and having heard oral argument; having found that there is no genuine issue as to any material fact and no controversial question of facts to be submitted to the trial court; and having concluded that the defendant, B. Franklyn Brown, is entitled to summary judgment as a matter of law; it is, therefore, by the Court, this 21st day of May, 1951:

Ordered, adjudged and decreed that the plaintiff, Doris B. Wesley, take nothing; that the action be and it is hereby dismissed; and it is further

Ordered, adjudged and decreed that summary judgment be entered in favor of the defendant, B. Franklyn Brown, for the sole ownership, title and interest to lot 19, square 4518, known as 532 Oklahoma Ave., N. E., Washington, D. C., and that it be and hereby is granted and vested in B. Franklyn Brown as the surviving spouse and surviving tenant by the entirety; and it is further

19 Ordered that this judgment be entered without cost.

(s) Walter M. Bastian, Judge.

• • • • •

20 Filed May 21, 1951. Harry M. Hull, Clerk

ORDER

This cause came on to be heard on the plaintiff's oral motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure; and the Court considered the answer to the motion filed by the plaintiff and by the defendant, Wesley S. Williams, committee for Frances L. Jenkins, patient; and considered the plaintiff's complaint for partition of real property (lot 19, square 4518, improved by premises known as 532 Oklahoma Ave., N. E., Washington, D. C.); and considered the other pleadings and the two orders in Civil Action 27173 dated March 8, 1950 and December 28, 1950; and having heard oral argument; having found that there is no genuine issue as to any material fact and no controversial question of facts to be submitted to the trial court; and having concluded that Doris B. Wesley is not entitled to judgment as a matter of law; it is, therefore, by the Court this 21st day of May, 1951:

Ordered, adjudged and decreed that the oral motion for summary judgment be and it is hereby denied.

(s) Walter M. Bastian, Judge.

• • • • •

21 Filed May 24, 1951. Harry M. Hull, Clerk

NOTICE OF APPEAL

Notice is hereby given this 24th day of May, 1951, that Doris B. Wesley, plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 21st day of May, 1951, in favor of B. Franklyn Brown against said Doris B. Wesley.

Lawson, McKenzie & Windsor, Attorney for Plaintiff, by (s) Marjorie McKenzie, 2001 11th St., N. W.

• • • • •

22 Filed June 4, 1951. Harry M. Hull, Clerk

**AMENDMENT TO NOTICE OF APPEAL FILED
ON MAY 24, 1951**

Notice is hereby given this 1st day of June, 1951, that Doris B. Wesley hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 21st day of May, 1951 granting the motion for summary judgment of defendant, B. Franklin Brown and denying the plaintiff's oral motion for summary judgment.

(s) B. V. Lawson, Jr., Attorney for Plaintiff, 2001
11th Street, N. W.

• • • • •

BRIEF FOR APPELLEE, B. FRANKLYN BROWN.

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

—
No. 11,058
—

DORIS B. WESLEY, *Appellant*,

v.

B. FRANKLYN BROWN and WESLEY S. WILLIAMS,
COMMITTEE of FRANCIS L. JENKINS, *Appellees*.

—
Appeal from the United States District Court for the
District of Columbia.
—

ROBERT W. McCULLOUGH,
WILLIAM T. PACE,
WILLIAM H. McCULLOUGH.
Attorneys for Appellee,
B. Franklyn Brown,
808 H Street, N. E.
Washington 2, D. C.

STATEMENT OF QUESTIONS PRESENTED.

1. The questions are correctly stated by the appellant.
2. In the opinion of the appellee, B. Franklyn Brown, there is a further question, to wit:

Sec. 16—409, D. C. Code (1940) is inapplicable because there never was a divorce. It is a prerequisite that the divorce or annulment be had before said section is applicable. The divorce proceeding abated by death and by subsequent Order of Court.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 11,058

DORIS B. WESLEY, *Appellant*,

v.

B. FRANKLYN BROWN and WESLEY S. WILLIAMS,
COMMITTEE of FRANCIS L. JENKINS, *Appellees*.

BRIEF FOR APPELLEE, B. FRANKLYN BROWN.

STATEMENT OF THE CASE.

B. Franklyn Brown and Frances Y. Brown were married and had two daughters, to wit: Doris B. Wesley, (appellant) and Frances L. Jenkins (co-appellee).

Mrs. Brown filed for and obtained a legal separation in November, 1945. On March 8, 1950, on motion of Mrs. Brown, the legal separation was enlarged into an absolute divorce (App. 9). Neither Order awarded alimony or adjudicated or referred to any property.

The record shows that Mr. and Mrs. Brown were owners of 532 Oklahoma Ave., N. E., Washington, D. C. as tenants by the entirety. On March 8, 1950 neither party asked the Court to adjudicate or apportion this real estate. Therefore, the Trial Judge signed an absolute divorce, providing

that the judgment shall not become final until the expiration of six months.

Mrs. Brown died five months and four days after the divorce was signed.

The same Trial Court, on December 28, 1950 made an Order finding that Frances Y. Brown died before the divorce decree could become effective to dissolve the marriage, and ordered and declared the proceeding abated because of death (App. 10).

No question is ever raised as to error or regularity and no appeal to any of the above proceedings or orders were noted. All of the orders were in Civil Action No. 27-173.

The appellant Doris B. Wesley, as plaintiff, filed a Complaint (App. 1) for partition of real property at 532 Oklahoma Ave., N. E. Said property was owned by her mother and father as tenants by the entirety before her mother, Frances Y. Brown, died. Her father, B. Franklyn Brown, as defendant (and now appellee) filed an Answer (App. 3), and a Motion for Summary Judgment (App. 4) with Points and Authorities (App. 5, 6, 7, 8), claiming the Trial Judge in the divorce proceeding did make a finding that Frances Y. Brown died before the divorce decree of March 8, 1950 could become effective to dissolve the marriage, and ordered and declared the proceeding abated because of death. Mr. Brown further contended that he was the sole and absolute owner of the real estate, which he and his wife owned as tenants by the entirety, because he was the surviving spouse and surviving tenant by the entirety.

The Trial Court in the partition suit considered the pleadings, the divorce decree, order abating the proceeding, and did grant a Motion for Summary Judgment to the defendant, B. Franklyn Brown (App. 15), and denied Summary Judgment to the plaintiff (App. 16).

B. Franklyn Brown submits that the Trial Court was correct as a matter of law and that the Order for Summary Judgment to the defendant, B. Franklyn Brown, should be affirmed.

SUMMARY OF ARGUMENT.

Mr. and Mrs. Brown were married and their marriage was terminated by the death of Mrs. Brown August 12, 1950.

Five months and four days before her death a legal separation had been enlarged to an absolute divorce. The divorce proceeding abated by the death and by Court Order. There isn't any property adjudication. The husband and wife were married at the time of her death and also owned real estate as tenants by the entirety. The husband survived; therefore, he owned the real estate, in fee simple.

Sec. 16-409 is inapplicable because there was no divorce, no final decree of divorce; neither party asked the Court to invoke relief whereby the Court, by Sec. 409, was authorized to grant and adjudicate property rights in one proceeding. Sec. 409 permits the husband and wife to retain the incidents of a tenancy by the entirety after their marriage is dissolved. If, instead of death on August 12, 1950, the parties would have vacated the decree by consent, or would have gone back and lived together, or would have re-married each other, or would have filed a notice of appeal, the ownership of the real estate would not as a matter of law have been disturbed, because there would not have been any annulment or divorce. Sec. 409 is applicable only when there is a divorce or annulment that is final.

District of Columbia and Nebraska statutes, relative to the six months clause in the divorce decree, are similar. Nebraska Courts have interpreted this six months clause similar to the interpretation by this Court in the recent case of *Oliver v. Oliver*. The Nebraska Courts have ruled that where the party dies within six months after entry of such decree the survivor becomes restored to all marital and property rights.

ARGUMENT.

The late Frances Y. Brown, deceased, had a right and a duty, as the moving party in a proceeding for enlargement of a legal separation, to apprise the Court of all the incidents of adjudication that the Court is asked to make. Where, as here, the moving party comes before the Court asking for a final severance of the bonds of marriage, she must be presumed to be requesting the full and complete relief to which she believes herself entitled. The failure to do so terminates the wife's rights or her heirs' rights to later receive further relief. *Holmes v. Holmes*, 81 U. S. Appeals, D. C., 132; 155 F. (2d) 737. The Court had the power and jurisdiction to adjudicate or apportion property at 532 Oklahoma Ave., N. E. This appellant in her brief, at pages 3 and 10, claimed to have relied upon Sec. 16-409 on March 8, 1950, and now believes equity should intervene so that she may inherit part of her mother's estate. The appellant was not a party to the divorce proceeding. She could not have relied upon that section as she did not have any legal or equitable interest in her parents' litigation in a divorce proceeding.

Frances Y. Brown, deceased, on March 8, 1950, asked the Trial Court for an enlargement of a legal separation. The Court granted her the enlargement; said divorce decree was a decree nisi, or interlocutory, providing that the divorce would not become absolute and effective for six months or until the final disposition of any appeal that may have been taken.

Upon the death of Frances Y. Brown five months and four days later, the divorce proceeding abated.

The same Trial Judge, on December 28, 1950, by a final Court Order, made a finding that the wife died before the divorce decree could become effective to dissolve the marriage and abated all the proceedings in the cause between Frances Y. Brown, deceased, and B. Franklyn Brown. This Order is part of the facts and law in the Complaint for Par-

tition of real estate, and the Trial Judge, in a Motion for Summary Judgment, was bound by this Order.

This Court, in the case of *Oliver v. Oliver*, 87 U. S. App. D. C. 334, decided October 23, 1950, 185 F. (2d) 429, said:

“Under the local statute the waiting period is made a preliminary and inseparable part of a proceeding for absolute divorce. Until that period has expired there is no complete and final termination of the marriage state. That such a waiting period was purposely designed seems perfectly clear from the language of the statute, and is borne out by the legislative record.”

* * *

“The divorce had not become absolute and effective. The marriage had not been terminated. It remained undissolved and an attempted second marriage in violation of the District’s law was void.”

Sec. 16-409 is not applicable in this Complaint for Partition of real estate. This section merely authorizes the Court to settle certain property rights.

This Court, in the case of *Wheeler v. Wheeler*, U. S. App. D. C., No. 10472, decided February 15, 1951, at page 2, note 1, states as follows:

“Further, the above-quoted portion of section 16-409 is concerned solely with matters of procedure and not with the substantive powers of the court. *It merely authorized* the court to settle in one proceeding the parties’ marital status and rights as to certain types of property holdings; prior to the statute, the present Federal rules as to joinder not then being in force, separate actions were required to settle the two matters, joinder being impermissible. *Richardson v. Richardson*, 72 App. D. C. 67, 112 F. 2d 19; H. R. Rep. No. 1532, 74th Cong., 1st Sess., p. 4 (1935).”

Death terminated the marriage of Mr. and Mrs. Brown. There is a prerequisite required before the Court, pursuant to Sec. 16-409, can adjudicate and settle certain property rights. The prerequisite is that there must be an absolute di-

vorce or annulment. Before this section was incorporated into the law, that was the prerequisite for filing a complaint to settle property rights that had formerly been held by husband and wife as tenants by the entirety. This section was added so that the Court had authority and jurisdiction to do it all on the same day. The law was not changed in that prerequisite to adjudicating certain types of property rights unless there had been a divorce or annulment.

This Court has construed this Code provision in the case of *Scholl v. Scholl*, 80 U. S. App., D. C. 292; 152 F. (2d) 672; and again in the case of *Heath v. Heath*, U. S. App., D. C., No. 10759, decided May 24, 1951; 189 F. (2d) 697.

The *Scholl* case is not applicable to the case at bar, because in that case the prerequisite had been complied with, to wit: a final absolute divorce from Florida.

The *Heath* case said: "This section of the code permits a husband and wife to retain the incidents of a tenancy by the entirety or a joint tenancy after their marriage is dissolved if they so agree. * * *"

The appellant in her brief, at page 8, quotes from the Kansas statute and urges this Court to follow the case of *Durland v. Durland*, 67 Kan. 734, 74 P. 274. This case was decided in 1903. This Court should not follow the rule in this case because it is contrary to the D. C. law as followed in *Oliver v. Oliver*, *supra*.

The full Kansas divorce statute is in two parts and the interpretation of it is set forth in *In re: Troemper's Estate*, 160 Kan. 464; 163 P. (2d) 379 (November 1945). This case also sets forth the Nebraska statute and interpretation of the Nebraska statute. The *Oliver* case, the *Wheeler* case, and the *Heath* case all dove-tail into the Nebraska statute and the Nebraska interpretation.

In *In re: Troemper's Estate*, the case was as follows:

Henry and Nannie Troemper were married 32 years and bona fide residents of Nebraska. After 32 years the wife filed for an absolute divorce in Nebraska. The defendant husband filed an uncontested answer and

also a property settlement stipulation disposing of all property in Nebraska, but nothing was said about the real estate in Kansas belonging to the husband. The Court granted wife an absolute divorce and the decree entered on Sept. 22, 1942 read as follows:

"The plaintiff was duly sworn and offered evidence in support of her petition. In consideration thereof the court finds that the plaintiff is entitled to a divorce from defendant upon the grounds as stated in her petition, the same however, *not to become absolute for a period of six months from this date. The court finds further in consideration of the stipulation on file with respect thereto, signed by both parties * * * .*"

No question is ever raised as to the regularity of the divorce proceeding.

On Oct. 15, 1942, twenty-three days after the divorce decree was entered defendant husband died intestate.

The primary question here is whether Nannie Troemper was the wife of Henry Troemper at the time of his death. Second, if she was his wife at the time, is she estopped by the property stipulation set out, *supra*, from claiming as his widow.

Nebraska and Kansas statutes relative to decrees of divorce are substantially similar. The Neb. statute (Sec. 42-340 RS of Neb., 1943) provides that "a decree of divorce shall not become final or operative until six months after trial and decision," etc. The Kans. statute (60-1514, GS 1935) provides: "Every decree of divorce shall recite the day and date when the judgment was rendered in the cause, and that the decree does not become absolute and take effect until the expiration of six months from said time." Along with section 60-514 of our (Kansas) statute should also be noted the provision of section 60-1512 GS 1935, that "it shall be unlawful for either party to such divorce suit to marry any other person within six months from the date of the decree of divorcement."

The Kansas and Nebraska courts have interpreted the respective statutes differently as to when the marital status is dissolved. We have held that under our statute the marital status is dissolved as of the date of the decree. (* * * cases cited * * *). The six

months' period provided for in our (Kansas) law has been construed as merely a prohibition against re-marriage of either party during that period. As to the effect of the provision upon marriage contracted outside the state during the six months period we are not here concerned. In Nebraska a contrary view has been reached. It is there held that no dissolution of the marital status takes place under a decree entered under the Nebraska law until the expiration of six months' period. *Holmberg v. Holmberg*, 106 Neb. 717; 184 NW 134. In Nebraska the divorce proceedings are treated simply as a *pending action during* the six months following the entering of the decree.

At page 383, the Court said: " * * * that under the Nebraska statute as construed by the supreme Court of that state a suit for divorce abates if either party dies before the expiration of the six months' period, is not subject to revivor, and property interest involved being merely incidental to the principal object are left as they were prior to the divorce proceedings." *Williams v. Williams*, Nebr., 19 N.W. (2d) 630, and cases there cited.

Another Nebraska case of *Sovereign Camp, W.O.W. v. Billings*, 107 Neb. 218; 185 N. W. 426, the Court held:

"Where a decree of divorce has been entered, under Section 1606, Rev. St. 1913 (now section 1555, Comp. St. 1922), the marriage status of the parties continues until the decree becomes operative to dissolve it, and, where the husband dies within six months after the entry of such decree, the relation of the surviving wife to the husband and to his estate is *held* not to be so fixed and altered by such decree that the wife is, in practical effect, a divorced wife, so as to be prevented from taking as a beneficiary under a certificate of insurance, where a by-law denies a divorced wife the right to the proceeds."

Justice O'Donoghue, in 1941, in the United States District Court for the District of Columbia, in Civil Action No. 8823, *Fleischauer v. Hagen*, 69 Washington Law Reporter 221, ruled that the surviving wife was entitled to

property rights of the deceased husband who died in the six month waiting time.

Surviving wife asked for an injunction and money judgment against the defendant, Metropolitan Police Retirement and Relief Fund. The defendant was represented by the Corporation Counsel's office. The facts in this case were: (a) In 1935 the plaintiff wife was granted a limited divorce. (b) March 8, 1940 the limited divorce was enlarged to an absolute divorce and contained the statutory provision to take effect in six months, etc. (date being September 8, 1940). (c) The defendant husband died July 15, 1940.

Justice O'Donoghue of that Court granted judgment for the surviving wife allowing her to obtain the property rights of her deceased husband as a surviving wife.

Re: Waller's Estate, 1928, 217 N.W. 588, 116 Neb. 352. Nebraska's divorce statute is similar to the District of Columbia.

Mr. Waller died two months later. The Appeal Court held Mrs. Waller "became restored to all her matrimonial and property rights in the Waller estate, and from the fact that the decree of divorce never became final she is the surviving widow of the decedent."

Chase v. Webster, Mass., 46 N. E. Reporter 705. A decree of divorce *nisi* does not dissolve the marriage, and hence the death of either party thereafter, and before the decree is made absolute, puts an end to the suit, leaving the survivor with all legal rights growing out of the marriage.

Spencer v. Clark, 179 P. 741; 54 Utah 83—by the Decree, it is:

"ordered, adjudged and decreed that the plaintiff, Ethel Atkinson Johnson, be and hereby is granted an interlocutory divorce from the defendant, Harry T. Johnson, dissolving and cancelling the marriage contract heretofore existing between them, and that said divorce shall become absolute and final after the expiration of six months from the date of this decree is

signed, unless the same be set aside, modified or appealed from."

One month 15 days after entry Mr. Johnson died. App. Court said:

"Since the plaintiff was the wife of Harry T. Johnson at the time of his death, it would naturally follow that *she became vested with every right which the law grants to the surviving spouse.*"

CONCLUSION.

It is respectfully submitted that the two Orders of the Trial Court should be affirmed.

Respectfully submitted,

ROBERT W. McCULLOUGH,
WILLIAM T. PACE,
WILLIAM H. McCULLOUGH.
808 H Street, N. E.,
Washington 2, D. C.,
Attorneys for Appellee,
B. Franklin Brown.

